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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1955.

No. 872

UNITED STATES OF AMERICA, ex rel.
SILVIO DARIO DURANTE,
Petitioner,

vs.

RALPH HOLTON, District Director of Immigration and Naturalization Service, etc.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

SALVATORE E. ODDO,
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CHAMPLIN-SHEALY COMPANY, CHICAGO 368

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RALPH HOLTON, District Director of Immigration and Naturalization Service, etc.,

Respondent.

(Petition for writ of *certiorari* to the United States Court of Appeals for the Seventh Circuit.)

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioner, Silvio Dario Durante, respectfully prays this Court's writ of *certiorari* to the Court of Appeals for the Seventh Circuit to review and reverse that Court's opinion and judgment in this case.

OPINIONS BELOW.

The opinion of the Court of Appeals for the Seventh Circuit is reported in 228 F. (2), at page 827 and is reprinted in full as Appendix I to this opinion.

The District Court rendered no written opinion.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

The judgment of the Court of Appeals was entered on January 11, 1956.

Rehearing was denied on February 7, 1956.

This Court's jurisdiction is invoked under Section 1254 (1) of the United States Judicial Code (U.S.C.A., Tit. 28, Sec. 1254 (1)), which confers upon this Court jurisdiction to review decisions of United States Courts of Appeals.

THE QUESTIONS PRESENTED.

The questions presented for review are:

1. MAY AN ALIEN WHO HAS BEEN CONVICTED OF TWO INFAMOUS CRIMES WITHIN THE MEANING OF THE PROVISIONS OF SECTION 241 (a) (4) OF THE IMMIGRATION AND NATIONALITY ACT (TITLE 8 U.S.C.A. PAR. 1251), QUOTED IMMEDIATELY BELOW, ASSAIL THOSE CONVICTIONS IN ADMINISTRATIVE DEPORTATION PROCEEDINGS AND UPON *HABEAS CORPUS*, IN THE DISTRICT COURT BY EVIDENCE *DE HORS* THE RECORD THAT ONE OF SUCH PROCEEDINGS WAS PROCURED BY MEANS WHICH VITIATE THE CONVICTION FOR WANT OF DUE PROCESS UNDER THE FOURTEENTH AMENDMENT, *VIZ.*,, THE FACT THAT SUCH CONVICTION WAS PROCURED BY A FALSE PROMISE OF LENIENCY AND PROBATION?

The District Court decided this question adversely to petitioner. The Court of Appeals decided it in his favor but held petitioner's undenied averments insufficient to demonstrate lack of due process. But since the

Government is at liberty to and doubtless will contend that the District Court was correct in its decision of this important and heretofore undenied question, it is presented on this record.

2. THE COURT OF APPEALS HELD THAT PETITIONER'S ALLEGATION THAT THE PROMISE THAT INDUCED HIS PLEA WAS MADE BY OFFICIALS OF THE STATE OF KANSAS WAS FATALLY DEFECTIVE BECAUSE IT DID NOT EXPLICITLY ALLEGE THAT THE AUTHORS OF THE PROMISE WERE PUBLIC OFFICIALS OF THE STATE OF KANSAS. DID THE COURT OF APPEALS READ PETITIONER'S PETITION SO NARROWLY AS ERRONEOUSLY TO ABRIDGE PETITIONER'S RIGHT TO A HEARING OF EVIDENCE UPON THE QUESTION FIRST ABOVE STATED?

3. ON PETITION FOR REHEARING, PETITIONER SOUGHT THE COURT OF APPEALS' LEAVE, ADMITTEDLY DISCRETIONARY, TO AMEND HIS PETITION IN THAT COURT OR FOR REVERSAL AND REMANDMENT WITH DIRECTIONS TO ALLOW THE AMENDMENT IN THE DISTRICT COURT UPON AN AFFIDAVIT DISTINCTLY NAMING THE PERSONS ALLEGED TO HAVE MADE THE FALSE PROMISES AND IDENTIFYING THEM AS THE SHERIFF AND THE PROSECUTING ATTORNEY OF THE STATE OF KANSAS. WAS THE COURT OF APPEALS' DENIAL OF THIS PETITION FOR REHEARING SO FAR AN ABUSE OF ITS DISCRETION AS TO CALL FOR THIS COURT'S POWER OF SUPERINTENDENCE AND REVIEW?

THE STATUTE INVOLVED.

The statute involved is Section 241 (a) (4) of the Immigration and Nationality Act (Tit. 8, U.S.C.A., Par. 1251), which provides in pertinent part:

"(a) Any alien in the United States . . . shall, upon the order of the Attorney General, be deported who—

. . .

"(4) . . . who at any time after entry is convicted of two crimes involving moral turpitude, not arising out of a single scheme of misconduct, regardless

of whether confined therefor and regardless of whether the convictions were in a single trial."

The official citation of this statutory provision is Act of June 27, 1952, (c) 477, Title II, Ch. 5, Sec. 241, 66 Stat. 204.

STATEMENT OF THE FACTS MATERIAL TO THE CONSIDERATION OF THE QUESTIONS PRESENTED.

Petitioner, detained upon an order commanding his deportation to Canada for conviction of two crimes involving moral turpitude under Section 241 (a) 4 of the Immigration and Nationality Act (Title 8, U.S.C.A., Par. 1251), sought the District Court's writ of *habeas corpus* to relieve him from that detention.

The cause was heard in the District Court upon the petitioner's amended petition (Tr. 26-28), the answer of the respondent, District Director of Immigration, to that petition, which answer set forth in the form of exhibits the administrative proceedings culminating in the order for deportation (*Answer*, Tr. 29-32, *Exhibits*, Tr. 33-87) and petitioner's reply to that answer, (Tr. 88-89).

The District Court, without hearing any evidence, denied issuance of the writ. (Tr. 101.)

Petitioner appealed to the Court of Appeals for the Seventh District from the District Court's judgment.

No disputed question of fact is presented.

The undisputed facts, all of which appear in the opinion of the Court of Appeals, are as follows:

Petitioner, a native and citizen of Canada, entered the United States on December 9, 1926, at the age of four years. His present age is therefore thirty-eight years. He has been married since 1940 and has three sons, ages thirteen, ten and two. (*Undenied averment in petition*, Tr. 27.)

The respondent sought to justify petitioner's deportation by two admitted convictions of two admittedly infamous crimes, first, a conviction of forgery, second degree, in Kansas in 1946 with respect to two small checks, and, second, a conviction in 1952 of burglary in Cook County, Illinois.

It was petitioner's contention in the District Court that both convictions, the conviction of forgery in Kansas and the conviction of burglary in Illinois, were vitiated for deportation purposes by lack of due process of law under the Fourteenth Amendment of the Constitution of the United States.

Petitioner asserted in substance that the conviction in Kansas was procured by promises of probation that were not fulfilled and that the conviction in Illinois denied due process in that petitioner was not informed prior to his plea that one of the consequences of that plea would render him subject to deportation. In the opinion of petitioner's present counsel, the Court of Appeals correctly decided the latter contention adversely to petitioner and it is not pressed here.

The District Court, without hearing any evidence, sustained the Government's contention that an alien may not assail either in administrative deportation proceedings or *via habeas corpus* in the District Court a State conviction on the ground that such conviction was infected by denial of due process where the claim of such denial rests on evidence *de hors* the record of conviction.

It therefore dismissed the petition.

The Court of Appeals differed with the District Court and considered what that court deemed to be the merits of petitioner's undenied allegations of the circumstances of his conviction of forgery in Kansas.

The precise text of these allegations is crucial and is as follows (*Petitioner's Amended Petition*, Par. 5, Tr. 27):

> "Your petitioner further represents that the circumstances under which he was convicted in the State of Kansas in 1946 are as follows: Your petitioner was engaged in the decorating business in the City of Goodland, Kansas, when he was arrested by the sheriff and charged with passing two small checks; that your petitioner denied that he executed or passed the checks and was not identified as the person who had passed the checks; that your petitioner was denied the privilege of communicating with an attorney and with his family, and escaped from the county jail and went to Denver, Colorado, where he surrendered himself to the local police in connection with the said charges of forgery in the State of Kansas, and that before he waived extradition to the State of Kansas he had been promised probation if he returned; however, when he entered a plea of guilty to the crime of forgery, second degree, he was sentenced to the State Penitentiary."

Although the opinion of the Court of Appeals recognizes that, contrary to the contention of the Government and the District Court, an alien may assail a State conviction for denial of due process by allegations and proof (or, as in the instant case, admission for want of denial) of facts vitiating a State conviction for lack of due process, the Court of Appeals held the above averments insufficient to entitle petitioner to a hearing:

The Court of Appeals said in its opinion, *post*, p. 17:

> "It is significant that in setting forth in his amended petition the facts in regard to the alleged promise to him, he fails to state who made the promise. Obviously, if someone authorized to represent the prosecution in Kansas made the promise, the legal effects thereof would be different than if the promise were made by someone having no authority to speak for the prosecution. We would resolve the doubt as to authority of the promisor in favor of Durante if the circumstances present at the time could have reasonably raised doubt

in his mind as to the authority of that person. However, we are not furnished by Durante with a recitation of any circumstances throwing light upon the authority, real or claimed, of the person making the alleged promise. Whether it was a law enforcing officer from Kansas or a Denver police officer, a bus driver, a railroad conductor, or a bartender we do not know. Before he had a right to rely upon the promise he had to have a reasonable belief that the person making the promise had authority from the state of Kansas to do so. The facts appearing in this record are utterly lacking to support Durante's contention as to the Kansas conviction."

The Court of Appeals further held that the failure of the judge of the Criminal Court of Cook County, Illinois, to inform petitioner that one of the consequences of his plea might be deportation did not vitiate that contention. Present counsel for petitioner agree that it is not the duty of the State court to warn every defendant that if he is an alien, a plea of guilty to an infamous crime may result as well in his deportation as in his punishment under the laws of the State. This is particularly true, we believe, when it is not even intimated that the trial judge had knowledge or cause to believe that the defendant before him for sentence was an alien. We therefore abandon that contention in this Court.

On petition for rehearing, petitioner asked the Court of Appeals to exercise its discretion either to allow him to amend or to reverse and remand with directions to the District Court to allow petitioner to amend his petition in conformity with the following affidavit, attached to the petition for rehearing and admittedly not presented to the District Court;

STATE OF ILLINOIS }
COUNTY OF COOK } SS

SILVIO DARIO DURANTE, being first duly sworn upon his oath, deposes and says that before waiving extradition from Colorado and pleading guilty to the charge of forgery in Kansas mentioned in the foregoing petition, he was informed by his (affiant's) attorney that John R. Fenno, then the Sheriff of Sherman County, Kansas, and Thomas H. Taggert, then the prosecuting attorney of that county, would recommend probation, that upon such assurance, he waived extradition and that before pleading guilty, *he was personally assured by the Sheriff, John R. Fennon, then Sheriff of Sherman County, Kansas,* that if he would plead guilty, he would be granted probation. He relied upon this assurance in pleading guilty.

(Signed) Silvio Dario Durante

Subscribed and sworn to before me this 25th day of January, A. D. 1956.

Mary Griffin,
Notary Public.

The Court of Appeals denied petition for rehearing.

REASONS RELIED ON FOR THE GRANTING OF THE WRIT.

ARGUMENT.

I.

Petitioner is detained solely by Federal process. This case is concerned solely with Federal consequences of State convictions and not with any present exertion of State or other corrective process. Infirmities in two of his convictions rest upon Federal grounds. In any event, petitioner has no available State remedies. He may therefore assail his convictions in this proceeding.

The Board of Immigration Appeals and the District Court concurred in holding in substance that respondent may not collaterally attack, either before the Board or in the District Court on *habeas corpus*, petitioner's convictions in Kansas and Illinois for infirmities not appearing in the record.

In so holding, the Board of Appeals and the District Court were clearly wrong.

Mooney v. *Holohan*, 294 U. S. 103, and the legion of cases in the United States Supreme Court and the United States Courts of Appeals sequent to that case make it an axiom that Federal writ of *habeas corpus* confers jurisdiction upon Federal courts to entertain attacks upon convictions in State courts.

To be sure, the writ will not ordinarily—indeed, almost never--issue where (1) the prisoner is detained *by State*,

not Federal, officials and (2) there exists a reasonably adequate State remedy.

In *Mooney* v. *Holohan*, sire of the progeny of cases declaring the existence of Federal jurisdiction to nullify State convictions but limiting the conditions under which that jurisdiction will be exercised, the Supreme Court of the United States said at page 113:

> "We are not satisfied, however, that the State of California has failed to provide such corrective judicial process. The prerogative writ of *habeas corpus* is available in that State. Constitution of California, Art I, § 5; Art. VI, § 4. No decision of the Supreme Court of California has been brought to our attention holding that the state court is without power to issue this historic remedial process when it appears that one is deprived of his liberty without due process of law in violation of the Constitution of the United States. Upon the state courts, equally with the courts of the Union, rests the obligation to guard and enforce every right secured by that Constitution. *Robb* v. *Connolly*, 111 U. S. 624, 637."

But, as this Court knows so well that to multiply citations would be a work of supererogation, the *rationale* of the principle of *Mooney* v. *Holohan* and the many cases following it the requirement (which never has been a jurisdictional inhibition) that prisoners convicted by State process resort to State remedies before invocation of the Federal writ is to prevent 'unseemly" conflicts "in our dual system of government." It is strong judicial policy that State penal, reformatory, corrective or other process shall not be interfered with.

No such "unseemly" conflict is present in this case.

Petitioner has fully expiated his alleged offenses against Kansas and Illinois. His alleged debt to those States has been fully requited. As matters stand now, neither Kansas,

in which petitioner does not even now reside, nor Illinois has any more interest in whether petitioner remains within or is transported beyond the borders of the United States than has Alabama, Oregon, New York or any exclusively Federal jurisdiction, such as the District of Columbia or Alaska, in none of which jurisdictions, so far as the record shows, petitioner has ever been present.

In short, we are concerned *only* with *purely Federal consequences* of State convictions.

That State convictions can be collaterally attacked in the Federal courts is well settled. See *Brown* v. *Allen*, 344 U. S. 443.

Now if the State convictions, when collaterally attacked, do not satisfy the Federal standards of constitutional due process or even of the "fair play" that must be accorded aliens before they can be deported, the Federal court is an especially appropriate forum in which to entertain the collateral attack necesary to determine whether such standards of fairness have been met.

In this proceeding the question whether petitioner should be deported arises under Federal law. The question whether convictions, considered only for the Federal purpose of deportation, are vulnerable to collateral attack under Federal constitutional standards of due process or statutory standards of fairness to immigrants is likewise purely a Federal question.

No question of State law or policy is involved and Federal courts can try questions of fact as conveniently as can State Courts.*

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* There are many civil cases—and *habeas corpus* is regarded as a civil remedy—in which purely Federal claims of right or liability depend upon transactions long since consummated under State law. Foremost among such questions are Federal tax cases. Whether funds are the absolute property of the taxpayer or are impressed with some trust, lien

But there is an even more compelling reason why petitioner may not under the applicable decisions of the United States Supreme Court, Courts of Appeals and other Federal courts be required to exhaust State remedies. *That reason is that he can not now do so!*

As we have noted, *Mooney* v. *Holohan* recognized Mooney's Federal right collaterally to assail a conviction in the State of California but forebore issuance of the writ of *habeas corpus* because it did not appear that *habeas corpus* was unavailing in California.

But it is obvious that the State of Kansas can not issue a writ of *habeas corpus* at the behest of a prisoner confined to Illinois on Federal process.

At the time that petitioner filed his petition, even Illinois, the State in which petitioner resides and in which he was physically detained, could not issue the writ of *habeas corpus* to compel Federal officers to discharge petitioner.

Petitioner, under the guidance of his present counsel, intends to file a petition with respect to his Illinois conviction in the nature of a writ of *coram nobis* on the ground that he was not fully advised of the consequences of his plea of guilty, a fact admitted on the present record, and a fact on which under Illinois law, as well as under due process, vitiates his conviction. But in Illinois, *coram nobis* is a civil proceeding even when it is brought to relieve a defendant from the consequences of criminal conviction. Therefore the State, as well as petitioner, has a right to appeal.

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or other condition annexed by State law may raise a substantial Federal question as to whether income has been received or, if it has been received, whether it has been received in a certain tax year. The Federal question of taxability depends upon the resolution of a question of State property law. Where the litigation is between the taxpayer and the Federal government, no one suggests that the parties should be remitted to the State courts for the resolution of the crucial question of State law.

If petitioner prevails and the State appeals but petitioner is transported to Canada, he can certainly not practically and perhaps not even theoretically resist the appeal. The United States Supreme Court has held that once a convicted defendant is beyond the borders of the jurisdiction convicting him, appeals need not be entertained. *Eisler* v. *U. S.*, 338 U. S. 189.

Finally, it would be strange doctrine indeed to hold that the Federal courts are not apropriate tribunals in which to try cases between the United States Government and an individual adversary.

II.

The Court of Appeals read the petition for habeas corpus so narrowly as to abridge petitioner's right to substantial justice. The error is of such moment as to call for the exercise of this Court's power of supervision of lower Federal Courts.

As we have explained in the Statement of the Case, *ante*, the petition did fail explicitly to allege that the false promises that induced petitioner to plead guilty in Kansas were made by a prosecuting attorney in the State of Kansas.

But the Government did not challenge the petition as insufficient in this respect, either in the District Court or in the Court of Appeals. HAD IT DONE SO, THE PETITION COULD HAVE BEEN READILY AMENDED IN THE LOWER COURT! Instead, the Government contended only that an alien subject to deportation proceedings may not assail in such proceedings the constitutionality of his conviction of a State crime by evidence *aliunde* the State record.

This claim appears from the following language from Paragraph 6 of the Government's answer (Tr. 31):

> "6. Your respondent moves to strike the allegations of paragraph 5 of the amended petition on the ground that this proceeding may not be used to collaterally attack a conviction in a court of the State of Kansas."

The District Court sustained this motion by dismissing the cause without taking of any evidence. Admittedly at least in affirming a decision of a lower District Court, a court of appeals may rest its judgment upon considerations other than or even opposed to those that afforded the basis for the District Court's judgment. But this power, like all other powers in jurisdiction in the strictest sense of the word, should be used in the ends of justice and not as technicalities.

It was perfectly plain from that no matter how precise petitioner's allegations might have been in the District Court, that court would not have entertained them because of its erroneous view that an alien may not assail his State conviction by evidence *de hors* the record. No trial in the District Court would have been required because that court denied any trial.

Had the District Court decided the substantive question correctly, it could, should and presumably would have given petitioner an opportunity to amend his petition in accordance with its obvious purport and intent.

Petitioner is thus about to lose his right of residence in this State because of the omission of a single sentence in his petition for *habeas corpus* such as "The persons making the false promises relied upon by petitioner in pleading guilty were the prosecuting attorney and the sheriff of Sherman County, Kansas."

We submit that so narrow a view of the office of the writ of *habeas corpus* should evoke this Court's review even if a petition for rehearing, discussed under Point III, *infra*, had not been filed.

III.

The Court of Appeals erred in its refusal to consider petitioner's affidavit appended to his petition for rehearing, not as evidence of the truth of the facts stated therein, but as grounds for permitting the amendment of his petition either in the Court of Appeals or in the District Court on remandment to that court.

As we have explained, petitioner sought leave on petition for rehearing to amend his petition for *habeas corpus* either in the Court of Appeals or in the District Court upon remandment to that Court so as to name Thos. H. Taggert, State's Attorney and John R. Fenno as the Sheriff of Sherman County, Kansas, as the persons who promised him probation in exchange for his plea of guilty.

This plea the Court of Appeals denied.

We admit that the power was discretionary in the Court of Appeals.

But we submit that the exigencies of this case are such that in order to avoid manifest injustice, petitioner ought to be granted leave to make the simple amendment sought.

Technically the motion should have been made in the District Court. But it is plain that it would not have been allowed in that Court because the District Court acceded to the Government's contention, that no matter what petitioner alleged, he could not go behind the record of his conviction. If, as we contend under Point I, this was clearly error, petitioner should not be deported from a land in which he has

lived since the age of four and taken from his wife and children unless they choose to sojourn in a foreign land because he lost the case on a serious substantive error of the District Court and upon a technicality in the Court of Appeals.

IV.

The questions presented are of such moment as to evoke this court's writ of certiorari.

The Government is contending, not only in this case, but presumably in all deportation cases, that an alien can not assail a State conviction for want of due process not appearing upon the record.

The Court of Appeals for the Seventh Circuit has recognized and in effect sustained petitioner's contention to the contrary but has refused to give petitioner's contention effect because of the deficiencies in petitioner's application for the writ of *habeas corpus*.

We submit that this substantive question alone is of sufficient moment, not only to aliens, but in the field of international relations, as to evoke this Court's writ of *certiorari*.

Respectfully submitted,

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In the
United States Court of Appeals
For the Seventh Circuit

No. 11521. October Term, 1955, October Session, 1955.

United States of America, *ex rel.* Silvio Dario Durante,
Petitioner-Appellant,

v.

Ralph H. Holton, District Director of Immigration and Naturalization Service, United States Department of Justice.
Respondent-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

January 11, 1956.

Before Finnegan, Swaim and Schnackenberg, *Circuit Judges.*

Schnackenberg, *Circuit Judge.* Upon the facts set forth in the amended petition for a writ of habeas corpus filed by Silvio Dario Durante,[1] and those facts set forth in the answer of Ralph H. Holton, District Director of United States Immigration and Naturalization Service,[2] to the extent that they were not denied by Durante's reply, the district court on April 14, 1955 dismissed the amended petition and remanded Durante to the custody of respondent. This appeal followed.

Relevant facts appear in the following statement.

Durante, a native and citizen of Canada, entered the United States on December 9, 1926. On July 1, 1952 a warrant for his arrest was issued by respondent's prede-

1. Herein referred to as Durante.
2. Herein referred to as respondent.

cessor charging that he had been found in the United States in violation of the Immigration act of February 5, 1917[3] for the reason that he had been sentenced more than once to imprisonment for terms of one year or more because of convictions in this country of crimes involving moral turpitude, committed after entering this country, to wit: forgery, second degree, and burglary. Following a hearing a warrant of deportation to Canada was issued on December 4, 1953. He was taken into custody thereunder and the instant proceeding was filed in the district court. That court directed that Durante be given another hearing, whereupon a special inquiry officer concluded that Durante was deportable on the charges stated in the warrant of arrest and upon an additional charge under § 241 (a) (4) of the act of June 26, 1952,[4] on the ground that, since the date of entry, Durante had been convicted of two crimes involving moral turpitude not arising out of a single scheme of criminal misconduct. Durante's appeal to the board of immigration appeals was dismissed. Another warrant was issued on February 7, 1955, directing Durante's deportation to Canada on all of the aforesaid charges.

Upon a plea of guilty entered by Durante to two counts charging him with forgery, on a count charging him with assault with a deadly weapon and on a count charging him with a jail break, the district court of Sherman County, Kansas on September 14, 1946, sentenced him on each of said counts to an indeterminate term in the state penitentiary, all of said sentences to run concurrently. He was thereup imprisoned and served said sentences.

The burglary conviction was entered on March 25, 1952 by the criminal court of Cook County, Illinois, on Durante's plea of guilty. He was then sentenced to the Illinois state penitentiary for a term of not less than one year and not more than two years, which sentence he served.

As a part of his answer respondent moved to strike paragraph five of the amended petition "on the ground that this proceeding may not be used to collaterally attack a conviction in a court of the State of Kansas." A part of said paragraph five, upon which Durante now relies, relates to his conviction in Kansas in 1946 and alleges that after being arrested there he "escaped from the county jail and

3. 39 U. S. Stat. at Large 889, 8 U. S. C. A. § 1101, *et seq.*
4. 8 U. S. C. A. § 1251(a) (4).

went to Denver, Colorado, where he surrendered himself to the local police in connection with the said charges of forgery in the State of Kansas, and that before he waived extradition to the State of Kansas he had been promised probation if he returned; however, when he entered a plea of guilty to the crime of forgery, second degree, he was sentenced to the State Penitentiary." Respondent never obtained a ruling from the district court on his motion to strike and he never denied the truth of the above quoted allegations. Hence, we shall accept them as true for our present purpose.

Respondent's answer denied the following allegations, *inter alia*, of paragraph six of the amended petition, pertaining to his plea of guilty in the Illinois court: respondent "was not informed that under his plea of guilty he was liable to deportation nor was he informed that he had a right to seek the recommendation of the sentencing judge not to be deported."

Inasmuch as the district court heard no evidence, it is conceded by the government that these alleged facts must be taken as true in the case now before us.

1. Durante contends that his plea of guilty, which resulted in his conviction in Kansas, was induced by his being "affirmatively misinformed of the consequences of his plea", and that, although he was doubtless advised as to the sentence that might be imposed upon him by the court in Illinois, he "was never advised that a further consequence of that sentence would or might be deportation * * *." He charges therefore that his convictions, both in Kansas and Illinois, "offend * * * the Fourteenth Amendment" of the United States constitution.

We are here confronted with the question of whether Durante, on the facts stated, was denied the due process of law which the fourteenth amendment requires. *Marino* v. *Ragen*, 332 U. S. 561, at 562.

It appears that to avoid prosecution on a forgery charge, Durante escape from the county jail in Kansas and went to Colorado where he surrendered to local police in connection with the Kansas charges, and that, before waiving extradition to Kansas, "he had been promised probation if he returned." Having returned to Kansas he entered a plea of guilty to the crime of forgery *inter alia*. It is not charged that anyone promised him probation if he would

plead guilty, although, if we resolve the recital of facts in favor of Durante, it could be said that they indicate that he was induced by a promise of probation to enter a plea of guilty. Following his plea of guilty he was sentenced to the state penitentiary, instead of being placed on probation.

It is significant that in setting forth in his amended petition the facts in regard to the alleged promise to him, he fails to state who made the promise. Obviously, if someone authorized to represent the prosecution in Kansas made the promise, the legal effects thereof would be different than if the promise were made by someone having no authority to speak for the prosecution. We would resolve the doubt as to authority of the promisor in favor of Durante if the circumstances present at the time could have reasonably raised doubt in his mind as to the authority of that person. However, we are not furnished by Durante with a recitation of any circumstances throwing light upon the authority, real or claimed, of the person making the alleged promise. Whether it was a law enforcing officer from Kansas or a Denver police officer, a bus driver, a railroad conductor, or a bartender we do not know. Before he had a right to rely upon the promise he had to have a reasonable belief that the person making the promise had authority from the state of Kansas to do so. The facts appearing in this record are utterly lacking to support Durante's contention as to the Kansas conviction.

In his brief in this court, Durante admits that in the Illinois court he was represented by counsel of his choice. He there pleaded guilty to burglary. He does not contend that, before he entered that plea, the trial judge failed to inform him of the possible consequences of such a plea, insofar as the possible punishment to be meted out by the Illinois court might be. He makes instead the rather remarkable contention that, while he was represented by his own attorney, it was the duty of the judge to tell Durante that a consequence of any sentence that the court might impose upon a plea of guilty "would or might be deportation from" the United States. There is no showing that the Illinois judge even knew that Durante was not a citizen of this country. Even if he had known it, there was no duty upon the court to advise Durante in regard to the possibility of deportation.

3. We conclude that neither the alleged promise made to Durante by some unknown person in Denver, Colorado or the failure of the Illinois judge to advise Durante about a possible future deportation proceeding, deprived him of any of his rights under the fourteenth amendment of the United States constitution. Hence, the judgments of conviction, upon which the warrant of deportation is based, are not the result of proceedings in which Durante was denied due process of law under the fourteenth amendment.

Accordingly the judgment of the district court is affirmed.

FINNEGAN, *Circuit Judge*, concurs in the result.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit.

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 872

UNITED STATES OF AMERICA, EX REL. SILVIO DARIO DURANTE, PETITIONER

v.

RALPH HOLTON, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. i-v) is reported at 228 F. 2d 827. The findings of fact and conclusions of law of the district court (R. 98-101) are not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on January 11, 1956 (Pet. App. i). A peti-

tion for rehearing was denied on February 7, 1956. The petition for a writ of certiorari was filed on April 17, 1956. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in a habeas corpus proceeding brought by an alien who has been ordered deported in accordance with Section 241(a)(4) of the Immigration and Nationality Act of 1952 for the commission of two crimes involving moral turpitude, a federal court may inquire as to the validity of a state record of conviction.

2. Whether a plea of guilty made in reliance on a promise of a sheriff that he would be granted probation constitutes a violation of due process where the defendant was represented by an attorney in whom he had confidence when he entered his plea.

STATUTE INVOLVED

Section 241(a)(4) of the Immigration and Nationality Act of 1952, 66 Stat. 163, 204, 8 U.S.C. (1952 ed.) 1251(a)(4), provides:

> Sec. 241. (a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—
>
> * * * * *
>
> (4) is convicted of a crime involving moral turpitude committed within five years after entry and either sentenced to confinement or confined therefor in a prison or corrective in-

stitution, for a year or more, or who at any time after entry is convicted of two crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial;

STATEMENT

This habeas corpus proceeding was instituted to challenge the legality of a deportation order entered against petitioner who admittedly is an alien convicted of two crimes involving moral turpitude since entry into the United States, and is therefore deportable under Section 241(a)(4) of the Immigration and Nationality Act of 1952, *supra*. The District Court for the Northern District of Illinois dismissed the petition (R. 101) and its action was affirmed on appeal (Pet. App. v).

The pertinent facts may be summarized as follows:

Petitioner entered this country from Canada in 1926 (R. 68). In 1946 he was arrested in Sherman County, Kansas, on a charge of forgery, but escaped from jail while being held on the charge (R. 58-60). He fled to Colorado, but later returned voluntarily (R. 60) and was convicted on a plea of guilty for forgery, jail breaking, and assault with a deadly weapon (R. 84-85). He was represented by an attorney at the time he entered his plea (R. 60, 84). He was given a concurrent sentence not exceeding ten years on the forgery and assault

counts, and not exceeding two years on the jail break count (R. 84-85).

In 1952 petitioner, on a plea of guilty, was convicted in Cook County, Illinois, of burglary, and was sentenced to a term of not less than one year nor more than two (R. 61, 72-73). He was represented by an attorney at the time he entered his plea and was sentenced (R. 72-73).

While in the Illinois State Penitentiary on the sentence for burglary, a warrant dated July 1, 1952 was served upon him in which he was charged with being in the United States in violation of the Immigration Act of 1917 in that he had been sentenced more than once to imprisonment for terms of one year or more for crimes committed in this country which involved moral turpitude, to wit: forgery and burglary (R. 66-67). At a hearing held at the Illinois State Penitentiary on September 24, 1953, petitioner was ordered deported (R. 45).

A petition for a writ of habeas corpus was filed on January 8, 1954 after petitioner was confined at the Cook County Jail, Chicago, Illinois on an order of deportation (R. 3). At a hearing before the District Court for the Northern District of Illinois on January 18, 1954, an order was entered continuing the cause to allow for another hearing by the Immigration Service at which petitioner could be represented by counsel (R. 6-20).[1]

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[1] A postponement of seven months had been previously granted petitioner by the hearing officer on his plea that he had not been able to procure counsel. Further postponement was denied at the September 24, 1953 hearing (R. 3-4).

The reopened hearing took place on January 25, 1954, at which time petitioner was accompanied by his attorney (R. 44, 45). It was continued until March 9, 1954 to allow petitioner's counsel time to investigate a new charge lodged against petitioner to the effect that he was in the United States in violation of Section 241(a)(4) of the Immigration and Nationality Act of 1952 (*supra*, pp. 2-3), since he was an alien who had committed two separate crimes involving moral turpitude since entry (R. 53-54, 55). At the continued hearing (R. 55-65), petitioner stated he was not guilty of the crime of forgery in Kansas (R. 59), that he gave himself up to the police authorities in Denver, Colorado for extradition to Kansas because "they told me if I came back to Goodland, Kansas, they would see that I got a probation" (R. 60). In answer to whether he had pleaded guilty, petitioner stated: "Well, I plead guilty to the assault. They told me that if I plead guilty they'd give me more time and make it more difficult. So I let the attorney handle everything. Like I said, I thought it was going to be a probation so I had confidence in my attorney. The way it turned out I got sentenced. * * *" (R. 60). The special inquiry officer found on the basis of the reopened hearing that petitioner was an alien convicted of two separate crimes involving moral turpitude, committed since entry, and ordered his deportation (R. 39-44). The Board of Immigration Appeals on November 2, 1954 affirmed the order (R. 33-36).

Petitioner, on February 14, 1955, filed an

amended petition for a writ of habeas corpus with the district court (R. 26-28) in which he alleged, *inter alia,* "* * * that before he waived extradition to the State of Kansas he had been promised probation if he returned * * *" (R. 27). The district court sustained the government's position that a habeas corpus proceeding could not be used to attack collaterally a conviction of the State of Kansas (R. 31), and that the only questions before the district court on a writ of habeas corpus in a deportation proceeding was whether the alien had had a fair hearing and whether there was substantial evidence to support the order of deportation (R. 96). The petition was dismissed (R. 100).

On appeal, the Court of Appeals did go behind the Kansas record of conviction to consider whether it was the result of proceedings lacking in due process (Pet. App. ii-v). It noted that the petition for a writ of habeas corpus did not state whether the promise of probation was made by one with authority, either real or claimed, to do so, and commented that the legal effects would be different if the person had no authority to speak for the prosecution (Pet. App. iv). The Court of Appeals concluded that neither prosecution upon which the deportation order was based deprived petitioner of any rights under the Fourteenth Amendment. Accordingly it affirmed the judgment below (Pet. App. v).

Petitioner sought to obtain a rehearing in the Court of Appeals, and filed an affidavit naming the sheriff and prosecuting officer of Sherman County, Kansas, as the persons, who, through his attorney,

informed him that they would recommend probation if he would waive extradition from Colorado (Pet. 8). He also stated in his petition that he was personally assured by the sheriff, before he entered his plea, that he would be granted probation if he pleaded guilty and in reliance on this assurance, he did plead guilty (Pet. 8). The rehearing was denied.

ARGUMENT

The affirmance by the Court of Appeals was based upon its consideration of the merits of the Kansas and Illinois convictions of petitioner. Thus, in effect, it was a ruling that the court might properly look behind a state record of conviction while considering a petition for a writ of habeas corpus in a deportation proceeding. In this respect, we believe the court below granted petitioner more than was his due, although we agree with its conclusions as to the merits of the state court convictions.

1. Petitioner does not deny that he is an alien of the class designated as deportable by the applicable statute, or that he has been accorded a fair hearing on his deportability by the immigration officials. By this habeas corpus proceeding, he challenges the legality, not of the immigration hearing, but of his convictions in the courts of Kansas and Illinois, which he never challenged by appeal or other legal proceedings in the tribunals of those states. Without giving the courts of those states an opportunity to determine whether he was denied due process in the criminal trials, he now asks that the federal courts decide that issue in this proceeding.

It is settled that a habeas corpus proceeding attacking an order of deportation does not open up for consideration the original judgment of conviction upon which the deportation order is based. *Pino* v. *Nicolls*, 215 F. 2d 237, 247 (C.A. 1);[2] *United States ex rel. Weddeke* v. *Watkins*, 166 F. 2d 369, 372-373 (C.A. 2), certiorari denied, 333 U.S. 876; *United States ex rel. Knauer* v. *Jordan*, 158 F. 2d 337, 339 (C.A. 7), certiorari denied, 331 U.S. 810; *Dengeleski* v. *Tillinghast*, 65 F. 2d 440, 441 (C.A. 1); *United States ex rel. Robinson* v. *Day*, 51 F. 2d 1022-1023 (C.A. 2); *Gib* v. *Weedin*, 8 F. 2d 489, 490 (C.A. 9). This point was recently discussed in the Respondent's Brief in Opposition in *Marino* v. *Holton*, No. 698, October Term 1955, certiorari denied on April 2, 1956. As the Respondent's brief in *Marino* pointed out at page 10, to hold that the Immigration and Naturalization Service cannot rely upon the record of a conviction found in the public papers of a state, but must instead assume the judicial task of reviewing all convictions upon which it bases deportation orders, would impose upon that Service an unreasonable, if not impossible, administrative burden of ascertaining *de novo* whether the alien is in fact guilty of the offenses of which he has been convicted.

Petitioner does not assert that Kansas or Illinois lacked procedures whereby he could have chal-

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[2] Reversed, *sub nom. Pino* v. *Landon*, 349 U. S. 901, in a *per curiam* decision that the conviction had not reached a sufficient degree of finality to support a deportation order.

lenged his alleged denial of constitutional rights. Indeed, he states that even now he plans to seek relief in Illinois from his conviction there on a writ of *coram nobis* (Pet. 12). The fact that Kansas may not have a procedure which permits a defendant to attack a sentence which has been fully served,[3] does not establish lack of due process with respect to the Kansas conviction. Many rights are lost if they are not timely asserted. Cf. *Sunal* v. *Large*, 332 U.S. 174. And petitioner, who was represented by counsel at the time of his plea in Kansas, and who served forty months (R. 60), had ample time while he was serving his sentence to attack his conviction if he had any basis for doing so.

2. In any event, as the Court of Appeals held, petitioner presents no grounds which would invalidate the Kansas conviction, the only one attacked in this Court (Pet. 7). That is so even if the petition for habeas corpus be treated as having been supplemented by the allegations contained in the affidavit attached to the petition for a rehearing in the Court of Appeals. In that affidavit, petitioner asserted that the sheriff and prosecuting officer of the county where he was charged with commission of the crimes of forgery, assault, and jail break, promised to recommend probation if he returned to Kansas (Pet. 8). He did not assert that they broke their alleged promise, but only that the

[3] The method of collateral attack on Kansas convictions is by habeas corpus, and therefore dependent on custody. Kans. Stat. (1949) 60-2201.

judge did not give him probation when he did return to stand trial. He further asserted that the sheriff personally assured him, before he entered his plea, that he would be granted probation if he pleaded guilty, and in reliance on that assurance he did so (Pet. 8).

Petitioner was represented by an attorney when he entered his plea (R. 60, 84). He stated that he had confidence in his attorney and let him handle everything (R. 60). It may be assumed that the attorney knew that a sheriff cannot bind a judge either to grant or deny probation, and that he informed petitioner of this fact. Cf. *United States* v. *Sturm*, 180 F. 2d 413, 416 (C.A. 7). Hence, even if petitioner had adduced proof in the district court that the sheriff made such a statement, that proof would not invalidate his plea of guilty. At most, such proof would show only that petitioner had had false hopes that the judge would heed the sheriff's suggestion. "A mere disappointed expectation of great leniency does not vitiate a plea." *Thomson* v. *Huff*, 149 F. 2d 842, 843 (C.A. D.C.). Since the facts set forth in the supplemental affidavit did not warrant a result different from that

reached by the Court of Appeals in its original decision, *i.e.*, that the Kansas conviction was valid, there was no sound reason to grant the petition for rehearing.

CONCLUSION

For the foregoing reasons, it is respectfully submited that the petition for a writ of certiorari should be denied.

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